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Respondents.

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1 Gonzalas dispatched his federal habeas petition for filing about May 25, 2017. ECF  
2 No. 8. This Court granted his Motion for Appointment of Counsel, and Gonzalas filed an  
3 Amended Petition through counsel. ECF No. 18. Respondents now move to dismiss  
4 ground A(3) as unexhausted. ECF No. 20 at 6-7.

5 **I. Legal Standards & Analysis**

6 **a. Exhaustion**

7 Respondents point out that Petitioner has acknowledged that ground A(3) is  
8 unexhausted. Id. at 7.

9 State prisoners seeking federal habeas relief must comply with the exhaustion rule  
10 codified in 28 U.S.C. § 2254(b)(1):

11 An application for a writ of habeas corpus on behalf of a person in custody  
12 pursuant to the judgment of a State court shall not be granted unless it  
appears that –

13 (A) The applicant has exhausted the remedies available in the courts of the  
14 State; or

15 (B) (i) there is an absence of available State corrective process; or

16 (ii) circumstances exist that render such process ineffective to protect the  
17 rights of the applicant.

18 The purpose of the exhaustion rule is to give the state courts a full and fair opportunity  
19 to resolve federal constitutional claims before those claims are presented to the federal  
20 court, and to “protect the state courts’ role in the enforcement of federal law.” Rose v.  
21 Lundy, 455 U.S. 509, 518 (1982); O’Sullivan v. Boerckel, 526 U.S. 838, 844 (1999); see  
22 also Duncan v. Henry, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
23 petitioner has given the highest available state court the opportunity to consider the claim  
24 through direct appeal or state collateral review proceedings. See Casey v. Moore, 386  
25 F.3d 896, 916 (9th Cir. 2004); Garrison v. McCarthy, 653 F.2d 374, 376 (9th Cir. 1981).

26 A habeas petitioner must “present the state courts with the same claim he urges upon  
27 the federal court.” Picard v. Connor, 404 U.S. 270, 276 (1971) (citations omitted). The  
28 federal constitutional implications of a claim, not just issues of state law, must have been

1 raised in the state court to achieve exhaustion. See id. at 276-78. To achieve exhaustion,  
2 the state court must be “alerted to the fact that the prisoner[] [is] asserting claims under  
3 the United States Constitution” and given the opportunity to correct alleged violations of  
4 the prisoner’s federal rights. Duncan v. Henry, 513 U.S. 364, 365-66 (1995); see also  
5 Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. §  
6 2254(b) “provides a simple and clear instruction to potential litigants: before you bring any  
7 claims to federal court, be sure that you first have taken each one to state court.” Lundy,  
8 455 U.S. at 520. “[G]eneral appeals to broad constitutional principles, such as due  
9 process, equal protection, and the right to a fair trial, are insufficient to establish  
10 exhaustion.” Hiivala, 195 F.3d at 1106 (citation omitted). However, citation to state  
11 caselaw that applies federal constitutional principles will suffice. Peterson v. Lampert,  
12 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

13 A claim is not exhausted unless the petitioner has presented to the state court the  
14 same operative facts and legal theory upon which his federal habeas claim is based.  
15 Bland v. California Dept. Of Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994), overruled  
16 on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000). The exhaustion  
17 requirement is not met when the petitioner presents to the federal court facts or evidence  
18 which place the claim in a significantly different posture than it was in the state courts,  
19 Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988), or where different facts are  
20 presented at the federal level to support the same theory, Pappageorge v. Sumner, 688  
21 F.2d 1294, 1295 (9th Cir. 1982) (Ely, J., concurring).

#### 22 **b. Procedural Default and Ineffective Assistance of Trial Counsel Claims**

23 In ground A(3) Gonzalas argues that his trial counsel rendered ineffective assistance  
24 when they failed to object to the State’s use of his former gang membership as bad  
25 character evidence, in violation of his right to free association. ECF No. 18 at 15-17.  
26 Gonzalas concedes that this ground is unexhausted. ECF No. 30 at 4-6. He urges this  
27 Court to treat the claim as technically exhausted/procedurally defaulted. “Procedural  
28 default” refers to the situation in which a petitioner in fact presented a claim to the state

1 courts but the state courts disposed of the claim on procedural grounds, instead of on the  
2 merits. A federal court will not review a claim for habeas corpus relief if the decision of  
3 the state court regarding that claim rested on a state law ground that is independent of  
4 the federal question and adequate to support the judgment. Coleman v. Thompson, 501  
5 U.S. 722, 730-31 (1991).

6 The Coleman Court explained the effect of a procedural default:

7 In all cases in which a state prisoner has defaulted his federal claims in state  
8 court pursuant to an independent and adequate state procedural rule,  
9 federal habeas review of the claims is barred unless the prisoner can  
10 demonstrate cause for the default and actual prejudice as a result of the  
alleged violation of federal law, or demonstrate that failure to consider the  
claims will result in a fundamental miscarriage of justice.

11 501 U.S. at 750.

12 Gonzalas describes a claim as “technically exhausted” if the state courts would no  
13 longer review it on the merits. Gonzalas acknowledges that that would be the case if he  
14 tried to submit a new petition with these claims to the state courts. ECF No. 30 at 4-6.  
15 First, the state courts would find Gonzalas’ petition time-barred, because he would be  
16 filing it outside the one-year statute of limitations. Id. at 4-5 (citing NRS 34.726). Second,  
17 the state courts would find the petition successive, because he has already filed a  
18 previous petition. Id. (citing NRS 34.810). Gonzalas agrees that the state courts would  
19 almost certainly apply those procedural bars and argues that therefore he does not have  
20 an available remedy in state court. Id. at 6. However, he asserts that he can demonstrate  
21 cause and prejudice to excuse the procedural default. Id. at 6-13.

22 To demonstrate cause for a procedural default, the petitioner must be able to “show  
23 that some objective factor external to the defense impeded” his efforts to comply with the  
24 state procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986) (emphasis added).  
25 For cause to exist, the external impediment must have prevented the petitioner from  
26 raising the claim. Id. at 492.

27 In federal habeas cases arising out of Nevada, the state courts generally apply  
28 substantially the same standards as the federal courts in determining whether a petitioner

1 can demonstrate either cause or actual innocence in order to overcome a claimed  
2 procedural default. Robinson v. Ignacio, 360 F.3d 1044, 1052 n.3 (9th Cir. 2004). Thus,  
3 if a petitioner has a potentially viable cause-and-prejudice or actual-innocence argument  
4 under the substantially similar federal and state standards, then she cannot establish that  
5 “it is clear that the state court would hold the claim procedurally barred.” Sandgate v.  
6 Maass, 314 F.3d 371, 376 (9th Cir. 2002) (quoting Franklin v. Johnson, 290 F.3d 1223,  
7 1230-31 (9th Cir. 2002)). On the other hand, if the petitioner has no such potentially viable  
8 arguments, then the claim indeed is technically exhausted; but it also is subject to  
9 immediate dismissal with prejudice as procedurally defaulted.

10 Ineffective assistance of counsel claims present a different situation in this context.  
11 Gonzalas argues that he can show cause and prejudice and that the default of ground  
12 A(3) should be excused under Martinez v. Ryan, 566 U.S. 1 (2012), because he received  
13 ineffective assistance of state postconviction counsel. ECF No. 30 at 6-13.

14 The Court in Coleman held that ineffective assistance of counsel in postconviction  
15 proceedings does not establish cause for the procedural default of a claim. Coleman, 501  
16 U.S. at 752-54. In Martinez, the Court established a “narrow exception” to that rule. 566  
17 U.S. at 9. The Court explained that:

18 Where, under state law, claims of ineffective assistance of trial counsel must  
19 be raised in an initial-review collateral proceeding, a procedural default will  
20 not bar a federal habeas court from hearing a substantial claim of ineffective  
21 assistance at trial if, in the initial-review collateral proceeding, there was no  
22 counsel or counsel in that proceeding was ineffective.

23 Id. at 17.

24 The Ninth Circuit has provided guidelines for applying Martinez, summarizing the  
25 analysis as follows:

26 To demonstrate cause and prejudice sufficient to excuse the procedural  
27 default, therefore, Martinez . . . require[s] that [Petitioner] make two  
28 showings. First, to establish “cause,” he must establish that his counsel in  
the state postconviction proceeding was ineffective under the standards of  
Strickland [v. Washington, 466 U.S. 668 (1984)]. Strickland, in turn, requires  
him to establish that both (a) post-conviction counsel's performance was  
deficient, and (b) there was a reasonable probability that, absent the  
deficient performance, the result of the post-conviction proceedings would

1 have been different. Second, to establish “prejudice,” he must establish that  
2 his “underlying ineffective-assistance-of-trial-counsel claim is a substantial  
3 one, which is to say that the prisoner must demonstrate that the claim has  
4 some merit.”

5 Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2014) (citations omitted).

6 Here, the Martinez analysis with respect to ground A(3) appears intertwined, to a  
7 large extent, with the analysis of the merit of the underlying ineffective assistance claim  
8 at trial. The parties have briefed whether Gonzalas’ postconviction counsel was  
9 ineffective under Strickland v. Washington and whether the underlying ineffective  
10 assistance claim is substantial. In the interests of judicial efficiency, the Court will defer  
11 ruling on the Martinez issue to the merits disposition of Gonzalas’ Petition. Therefore, the  
12 Court denies the Motion to Dismiss at this point but defers a determination as to whether  
13 Gonzalas has demonstrated cause and prejudice to excuse the procedural default of  
14 ground A(3).

15 **IT IS THEREFORE ORDERED** that Respondents’ Motion to Dismiss (ECF No. 20) is  
16 **DENIED** as set forth in this Order.

17 **IT IS FURTHER ORDERED** that Respondents’ Motion for Extension of Time to File a  
18 Response to the Amended Petition (ECF No. 19) is **GRANTED** *nunc pro tunc*.

19 **IT IS FURTHER ORDERED** that Respondents shall have **sixty (60) days** from the  
20 date this Order is entered within which to file an Answer to the Amended Petition.

21 **IT IS FURTHER ORDERED** that Petitioner shall have **forty-five (45) days**  
22 following service of Respondents’ Answer in which to file a Reply.

23 DATED: 13 December 2019.

24   
25 RICHARD F. BOULWARE, II  
26 UNITED STATES DISTRICT JUDGE  
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